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In The Supreme Court of the United States
October Term, 1991

STEVE W. PUCKETT, ET AL.,
PETITIONERS

VERSUS

WALTER LEE JOHNSON
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the ministerial nature of the duties performed by the foreman of a grand jury defeats a claim brought under the Equal Protection Clause of the Fourteenth Amendment just as the ministerial nature of a foreman's duties defeats a claim brought under the Due Process Clause of the Fifth Amendment?

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Petitioners

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Respondent

PETITION FOR WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

INTRODUCTION

Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its decision in this case.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals was rendered on April 29, 1991 in Johnson v. Puckett, 929 F.2d 1067

(5th Cir. 1991). A copy of the opinion of the Court of Appeals is included herewith as Appendix A.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under the authority of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners submit that this case involves the application of the Fifth and Fourteenth Amendments of the United States Constitution.

Fifth Amendment to the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section I of the Fourteenth Amendment to the United States Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History.

The case at bar was originally prosecuted in the Circuit Court of Lafayette County, Mississippi, on change of venue from Panola County, Mississippi.

Walter Lee Johnson was indicted by the Panola County grand jury during its September, 1979 Term for the crime of capital murder. He was sentenced by the trial court to a term of life imprisonment in the state penitentiary. Johnson v. State, 404 So.2d 553, 554 (Miss.1981).

Johnson appealed the conviction and sentence to the Mississippi Supreme Court. He asserted one assignment of error: that discrimination in the selection of the grand jury foreman existed at the time of his indictment. On October 14, 1981, that court rendered its opinion in this case. Finding that there was no discrimination, the sole assignment of error was rejected. The conviction and sentence was affirmed by a unanimous court.¹ Id. at 557.

¹Only eight of the nine justices of the Mississippi Supreme Court participated in this case. Justice Sugg took no part in the decision.

Seven years later, Johnson filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi, Western Division. In that petition, Johnson asserted that he had filed a Petition for Writ of Error Coram Nobis in the Mississippi Supreme Court. The error coram nobis petition raised, among other claims, the following: that Johnson was denied due process based upon the discrimination in the picking of the grand jury foreman. Johnson also asserted that the petition for error coram nobis relief had been denied by the Mississippi court.

In his petition for habeas corpus relief, Johnson again raised the same claim, relying on the same legal basis.

Ground 1. Discrimination in Selection of Grand Jury Foreman Existed at the Time of Petitioner's Indictment.

From 1959 til 1979 Circuit Court judges of Panola County, Mississippi failed to select a black grand jury foreman and their practice in selecting the foreman was done in a discriminatory manner and that discrimination did infact [sic] exist at the time of the petitioner's indictment. Petitioner was denied of due process when the circuit court judge racially discriminated in selecting the grand jury foreman. It was proven since 1959 til 1979 that forty-two (42) grand jury foreman's had been selected and that none were black.

The case was referred to Magistrate Judge Jerry A. Davis who issued his Report and Recommendation on June 28, 1989. The report rejected all of Johnson's claims with the exception of that claim based on discrimination in the selection of the grand jury foreman. The Magistrate Judge found that Johnson had established a prima facie case of discrimination under Rose v. Mitchell, 443 U.S. 545 (1979). Steve W. Puckett, et. al., strenuously objected to

the Magistrate's recommendation, contending that Hobby v. United States, 468 U.S. 339 (1984), pronounced the applicable law.

On February 1, 1990, the District Court issued an opinion concluding that the Magistrate Judge's finding on this claim was in error and that the Hobby opinion was controlling. An order was entered denying habeas corpus relief and dismissing the cause with prejudice.

Thereafter, a certificate of probable cause was issued and an appeal presented to the United States Court of Appeals for the Fifth Circuit. Johnson pursued only that claim pertaining to discrimination in the selection of the grand jury foreman. The claim was briefed and argued and on April 29, 1991, the Court of Appeals issued its opinion. Reversing and remanding, the Court found that the

applicable standards were stated by this Court's opinion in Rose v. Mitchell and held that the grand jury foreman selection process violated Johnson's right to equal protection under the Fourteenth Amendment. Johnson v. Puckett, 929 F.2d 1067 (5th Cir. 1991).

From this ruling, Steve W. Puckett, et al., petition for a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals in this cause.

B. Statement of Facts.

Johnson and a co-defendant, Willie Earl Patton, were indicted by the Panola County grand jury for the robbery and murder of Birnie Keating, the owner of a small service station. Johnson's motions for severance and change of venue were granted and he was tried in the Circuit Court of Lafayette County, Mississippi.

The evidence showed that Johnson had borrowed a car and spoken with another man about "getting some quick money." Johnson v. State, 404 So.2d at 554. His co-defendant testified at trial about the ensuing robbery of the Keating Service and to the beating Johnson administered to Keating. The opinion on direct appeal described succeeding events:

The Shelby County medical examiner testified Keating's death was due to multiple blunt trauma to the head.

After the robbery, appellant admitted to several friends that he had robbed a store in Sardis and beaten a man during this robbery. On October 30, 1979, appellant was arrested in Indianapolis, Indiana, by the F.B.I.

This record reveals a needless, inexcusable killing, brutally accomplished in the course of an armed robbery. We find the verdict of the jury was more than justified by the evidence, and, under the circumstances, appellant was fortunate not to have been

sentenced to suffer the death penalty.

Johnson v. State, 404 So.2d at 554-55.

Johnson was sentenced to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections. Johnson v. State, 404 So.2d at 554.

REASONS FOR GRANTING THE WRIT

The ruling of the Fifth Circuit Court of Appeals in the case sub judice is not in conformity with the precedent of this Court in its resolution of a claim of discrimination in the selection of a grand jury foreman. The ruling below also creates a conflict among the United States Courts of Appeals regarding the proper criteria to be utilized for the consideration of such a claim.

ARGUMENT

The ministerial nature of the duties performed by the foreman of a grand jury defeats a claim brought under the Equal Protection Clause of the Fourteenth Amendment just as the ministerial nature of a foreman's duties defeats a claim brought under the Due Process Clause of the Fifth Amendment.

A brief review of the historical treatment of claims involving allegations of discrimination in the selection of grand jury foremen sets the stage for this Court's resolution of the current conflict between its own precedent and the holding of the Court of Appeals in the case sub judice. The claim at issue found its origin in those cases concerning the alleged exclusion or underrepresentation of identifiable groups from the grand jury process.

In Castaneda v. Partida, 430 U.S. 482 (1977), this Court considered a claim of

discrimination against Mexican-Americans in the State of Texas's grand jury selection process. The opinion began its discussion with the recognition that to try a defendant of a particular race under an indictment issued by a grand jury from which all persons of that race had been excluded on the basis race constituted a denial of the equal protection of the laws. 430 U.S. at 492. The opinion relied on Alexander v. Louisiana, 405 U.S. 625 (1972), and other cases which involved both the absolute exclusion of identifiable groups and the substantial underrepresentation of identifiable groups.

Three prerequisites for federal relief from the allegedly discriminatory selection process were outlined.

Thus, in order to show that an equal protection violation has occurred in the context of grand

jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

430 U.S. at 494-95 [emphasis added, citations omitted].

Once these prerequisites have been met and the defendant has shown substantial underrepresentation of his

group, this Court found that a prima facie case of discriminatory purpose had been raised under the Equal Protection Clause. The burden then shifted to the state to rebut this case. 430 U.S. at 495.

Two years later, the question to be resolved narrowed in scope. A claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment was considered in Rose v. Mitchell, 443 U.S. 545 (1979). No discrimination was alleged with respect to the selection of the venire. However, discrimination was alleged with respect to the selection of the foreman of the Tennessee grand jury. The facts of the case and the application of the law to the facts were initially set aside so that two arguments could be addressed.

Only one of the arguments is of interest here: "whether claims of grand

jury discrimination should be considered harmless error when raised . . . by a defendant who has been found guilty beyond a reasonable doubt by a properly constituted petit jury at a trial on the merits that was free from other constitutional error." 443 U.S. at 551. In answering in the negative, the focus was on the Equal Protection Clause of the Fourteenth Amendment. During its discussion of the issue, however, this Court provided the following dictum in a footnote.

In view of the disposition of this case on the merits, we may assume without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire.

443 U.S. at 551, n.4 [citing Carter v. Jury Commission, 396 U.S. 320, 338 (1970)].

The merits of the case were then reviewed and the conclusion reached that the respondents had failed to make out a prima facie case of "discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment with regard to the selection of the grand jury foreman." 443 U.S. at 574 (emphasis added).

Claims of discrimination in the selection of grand jury foremen began to be addressed by the federal circuit Courts of Appeals. The resulting conflict among the circuits was pointed out in the opinion of the District Court in this cause. In Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981), the petitioner claimed that his right to equal protection of the laws was violated by the systematic exclusion of black persons from service as state grand jury foreman. The Fifth

Circuit accepted the assumption made in the Rose v. Mitchell dictum and stated that "...if convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination affected only the foreman." 661 F.2d at 499. The same assumption was accepted in Williams v. State of Mississippi, 608 F.2d 1021 (5th Cir. 1979).

Both Guice v. Fortenberry and Williams v. Mississippi were decided prior to this Court's decision in Hobby v. United States, 468 U.S. 339 (1984). Therefore, although the framework of Rose v. Mitchell was adopted by the Fifth Circuit in Guice, we submit that Guice is not dispositive as asserted by the court below. Johnson v. Puckett, 929 F.2d at 1071. We further note that the Fifth Circuit did not find discrimination in the

foreman selection process in Guice. What that Court found was the need for an evidentiary hearing on the question warranted remand. Guice, 661 F.2d at 508.

The question was before the Fifth Circuit for review again in United States v. Cronn, 717 F.2d 164 (5th Cir. 1983). The District Court for the Northern District of Texas had considered a claim involving the discriminatory selection of a federal grand jury foremen based on the Due Process Clause of the Fifth Amendment. United States v. Cronn, 559 F.Supp. 124 (N.D.Tex. 1982). The District Court found the position of a federal grand jury foreman very different from the state jury foremen challenged in Rose v. Mitchell and Guice v. Fortenberry and, further, that the position of a federal grand jury foreman was not constitutionally significant. The District Court

concluded: "Therefore, the Defendant in this case has no cause of action under the 5th Amendment to challenge the selection procedure used for federal grand jury foremen." Cronn, 559 F.Supp. at 126. The Fifth Circuit affirmed that decision on the narrow ground of standing. Cronn, 717 F.2d at 170.

At the same time, the Fourth Circuit Court of Appeals, like the Texas District Court, had concluded that the position of federal grand jury foreman was not constitutionally significant. United States v. Hobby, 702 F.2d 466, 471 (4th Cir. 1983).² However, during the same time period, the Eleventh Circuit Court of Appeals had considered a like claim based

²The opinion by the Fourth Circuit does not reflect the legal theory on which the claim of discrimination was based. Respondent assumes the Due Process clause was at issue due to this Court's later opinion in the same case.

on "the equal protection component of the Fifth Amendment due process clause." United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir.1982). That Court refused to accept the argument that the role of federal grand jury foreman was constitutionally insignificant. 672 F.2d at 1386. The same conclusion was reached by the Eleventh Circuit in United States v. Cross, 708 F.2d 631 (11th Cir. 1983).

Thus at this point in the state of the law there was a conflict among the circuits concerning the proper resolution of the question of discrimination alleged in the selection process of a federal grand jury foreman. See also Hobby, 468 U.S. at 342, n.1. However, a second conflict existed: the approach utilized to address resolution of allegations of discrimination in the selection of a state grand jury foreman brought under the Equal

Protection Clause of the Fourteenth Amendment versus the approach utilized to address the same allegations directed against the selection of a federal grand jury foreman brought under the Due Process Clause of the Fifth Amendment.

We submit that both conflicts were resolved by this Court's opinion in Hobby. The dual conflicts were recognized in the reason set forth for granting certiorari in that case.

The Court of Appeals recognized that in *Rose v Mitchell*, 443 US 545, 551-552, n.4, 61 L Ed 2d 739, 99 S Ct 2993 (1979), this Court assumed without deciding that discrimination in the selection of the foreman of state grand jury would require that a subsequent conviction be set aside. The Court of Appeals noted, however, that the function of the grand jury foreman in the federal system differs substantially from the role of the grand jury in the states. The court concluded that the rights of defendants are fully protect by assuring that the composition of the

federal grand jury as a whole is not the product of discriminatory selection.

We granted certiorari to resolve a conflict among the Circuits on this issue.

Hobby, 468 U.S. at 342 [emphasis in original].

After review of the selection process utilized by the federal court system, this Court concluded that, based on three considerations, the assumption made in Rose was not appropriate in Hobby. The rationale of this Court in distinguishing its decision from the earlier opinion in Rose v. Mitchell is enlightening:

Petitioner argues that the Court's decision in Rose v. Mitchell supports his position that discrimination in the selection of federal grand jury foremen warrants the reversal of his conviction and dismissal of the indictment against him. In Rose, two Negro defendants brought an equal protection challenge to the selection of grand jury foremen in Tennessee. The Court rejected the view that claims of grand jury

discrimination should be considered harmless error when raised by a defendant who had been convicted by a properly constituted petit jury at an error-free trial on the merits, and adhered to the position that discrimination in the selection of the grand jury as a valid ground for setting aside a criminal conviction. The Court then assumed "without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire."

468 U.S. at 346-347 [emphasis in original, citations omitted].

The scope of the Rose v. Mitchell decision was defined when the Court stated:

Moreover, Rose must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible

population at large. The foreman then served as "the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof."

468 U.S. at 347 [emphasis added, citations omitted].

The Hobby decision then contrasted the manner of selecting the grand jury foreman in Tennessee with that used in the federal system. The conclusion reached was that the powers granted the federal grand jury foreman are far more restricted than those granted under the Tennessee system. Accordingly, the ministerial nature of the duties performed by a grand jury foreman defeated the claim brought under the Due Process Clause of the Fifth Amendment.

Additionally, the conflict between the two separate theories of relief, due

process and equal protection, merged with the following language.

At oral argument, petitioner eschewed primary reliance upon any particular constitutional provision and instead invoked this Court's supervisory power over the federal courts as a basis for the relief he seeks. Only by setting aside his conviction and dismissing the indictment against him, petitioner urges, will this Court deter future purposeful exclusion of minorities and women from the post of federal grand jury foreman. It is true that this Court's "supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." However, we decline petitioner's invitation to embark upon the course of vacating criminal convictions because of discrimination in the selection of foremen. Less Draconian measures will suffice to rectify the problem.

468 U.S. at 350 [emphasis added].

It follows that the ministerial nature of the grand jury foreman's duties can also

defeat a claim brought under the Equal Protection Clause of the Fourteenth Amendment.

Other courts have also understood the distinction the Hobby Court drew between the nature of the duties at issue in the Hobby and Rose cases. The opinion of the Fifth Circuit in the case sub judice only re-opens a settled question.

The distinction so drawn was recognized by the District Court in Johnson v. Thigpen, 623 F.Supp. 1121 (S.D.Miss. 1985), when that court reviewed a claim of discrimination in the selection of the grand jury foreman in light of Rose and Hobby. Finding that the subsequent decision in Hobby "added gloss" to the prior Rose opinion, the District Court followed the guidance provided by this Court in Hobby and conducted a comparison between the powers of a grand jury foreman

in the Mississippi and the powers of the grand jury foreman Tennessee. 623 F.Supp. at 1135. The powers of a grand jury foreman in Mississippi were found to be far more restricted than those utilized in Tennessee and at issue in Rose. The claim was found to be without merit. The District Court holding was affirmed by the Fifth Circuit Court of Appeals. Johnson v. Thigpen, 806 F.2d 1243 (5th Cir.1986). See also Matthews v. Barnett, 918 F.2d 955 (4th Cir. 1990) (unpublished) (United States Supreme Court has distinguished Rose).³

³The unpublished opinion in Matthews also points out that state courts are divided on the issue of whether the ministerial nature of a grand jury foreman's duties defeats an equal protection claim. Compare State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987), with State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

The function and powers of a grand jury foreman have also been found to be the determinative factors by the Sixth Circuit Court of Appeals. The habeas petitioner in Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988), claimed that the exclusion of blacks from the jury commission during a twenty year period of time violated the equal protection clause. The Sixth Circuit found that even if the absence of blacks on the jury commission proved a violation of equal protection, the Constitution did not compel reversal of Ford's conviction since he had suffered no prejudice and "any discrimination in the appointment of the commissioners would not undermine the integrity of the indictment and conviction". 841 F.2d at 689. The Court of Appeals continued:

Additionally, the impact of any perceived discrimination in selecting the commissioners

would not, because of the technical nature of the commissioners' job responsibilities, cast doubt on the judicial process. In Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), the Supreme Court held that although the discriminatory selection of federal grand jury foremen violates the constitution, reversal of a criminal defendant's conviction is an inappropriate remedy for the violation because grand jury foremen play a minor part in federal prosecutions. Hobby 468 U.S. at 350, 104 S.Ct. at 3099. The Court held that "the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." Id. at 345, 104 S.Ct. at 3097. The Court determined that the role of the foreman is insignificant because the responsibilities of a foreman are not a creature of the Constitution and are clerical in nature, and also because a foreman has no influence in determining whether an individual is to be prosecuted. Here, the jury commissioners in Kentucky are not a creature of the

Constitution but of Kentucky statutory law and their responsibility of selecting jurors is merely clerical in nature. Additionally, the jury commissioners do not participate as grand or petit jurors and thus have no direct influence over the outcome of any criminal cases.

841 F.2d at 289-6901.

The petitioner's equal protection claim was rejected. cert. denied, Ford v. Kentucky, 469 U.S. 984 (1984). Thus the decision of the Sixth Circuit in Ford conflicts with the opinion of the Fifth Circuit in the case at bar.

The method of selecting a grand jury foreman in Mississippi is analogous to the federal foreman selection process discussed in Hobby and radically different from the method described in Rose. Section 13-5-2, Miss.Code Ann. (Supp.1990) provides for the random method of jury selection as follows.

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

In Herring v. State, 374 So.2d 784 (Miss.1979), the Mississippi Supreme Court described this procedure in greater detail.

In Mississippi, a jury commission is established in each county by the appointment of three (3) commissioners for four-year terms, one member each being appointed by the circuit judge, the chancery judge, and the board of supervisors of said county. The jury commission compiles and maintains a master list consisting of the voter registration lists of the county. From the master list, a certain number of prospective jurors, as provided by Section

13-5-10, Mississippi Code Annotated (1972), are selected and placed in the jury wheel. They are selected by the jury commission at random from the master list in the following manner:

The total number of names on the master list shall be divided by the number of names to be placed in the jury wheel; the whole number nearest the quotient shall be the 'key number,' except that the key number shall never be less than two (2). A 'starting number' for making the selection shall then be determined by a random method from the number from one (1) to the key number, both inclusive. The required number of names shall then be selected from the master list by taking in order the first name on the number and then successively the names appearing in the master list at intervals equal to the key number, recommencing — if necessary at the start

of the list until the
required number of
names has been
selected... Miss.Code
Ann. §13-5-12
(Supp.1978).

Prior to the term of court where
jurors are required, upon order
of the court, a private citizen,
who does not have an interest in
a case pending trial and who is
not a practicing attorney,
publicly draws at random from
the jury wheel the names or
identifying numbers of as many
prospective jurors as the court
by order requires. Miss.Code
Ann. §13--5-16 (Supp.1978).

Formerly, when court convened,
names of jurors selected from
each supervisor's district were
drawn in open court from five
(5) separate boxes or
compartments representing those
districts. Under the present
system, district lines are
obliterated, and, upon
direction of the trial judge,
the clerk draws the required
number of grand jurors [usually
eighteen (18)] from one (1) box
containing all names of
prospective jurors for the week.
After the grand jurors are so
selected, the trial judge is
required by Mississippi Code
Annotated Section 13-5-45 (1972)
to appoint a member of the grand
jury to be foreman. When

appointed, the foreman is administered the statutory oath and the other grand jurors are administered an oath that they will be bound by the same oath taken by the foreman.

Thus, in Mississippi (unlike Tennessee) the grand jury foreman is appointed from a selection method, which, from the very inception, has been a random process and non-discriminatory. No attack has been made upon the constitutionality of that selection method.

374 So.2d at 786-787.

Unlike the method utilized in Tennessee, a grand jury foreman in Mississippi has no more discretionary responsibilities or duties than any other member of the grand jury. Further, the foreman in Mississippi is randomly selected by the trial judge from a grand jury that is duly constituted. The role of a federal grand jury foreman was described in Hobby.

As Rule 6(c) illustrates, the responsibilities of a federal grand jury foreman are essentially clerical in nature: administering oaths, maintaining records, and signing indictments. The secrecy imperative in grand jury proceedings demands that someone "mind the store," just as a secretary or clerk would keep records of other sorts of proceedings. But the ministerial trappings of the post carry with them no special powers or duties that meaningfully affect the rights of persons that the grand jury charges with a crime, beyond those possessed by every member of that body. The foreman has no authority apart from that of the grand jury as a whole to act in a manner that determines or influences whether an individual is to be prosecuted. Even the foreman's duty to sign the indictment is a formality, for the absence of the foreman's signature is a mere technical irregularity that is not necessarily fatal to the indictment.

468 U.S. at 344-345.

However, a brief comparison between Herring v. State and the above reveals the numerous similarities between the federal

selection system and the selection system in Mississippi, including the ministerial nature of the foreman of each. The contrast between those two systems and the system described in Rose and utilized in Tennessee can be found in this description from Hobby.

The foreman selection process in Rose therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed Rule Crim Proc 6(c); the federal foreman, unlike the foreman in Rose, cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint

the operation of the judicial process.

468 U.S. at 348.

A comparison of the three systems found in Rose, Hobby, and Mississippi leads to the conclusion that the selection procedure and the ministerial duties of the grand jury foreman in Mississippi are remarkably similar to those found in Hobby. We submit that the rationale of Hobby is controlling here. As long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as a foreman who will perform ministerial duties will taint the judicial process. The decision of the Fifth Circuit finding otherwise is, therefore, in direct contradiction with this Court's prior opinion, the opinion of the Sixth Circuit Court of Appeals, and, impliedly, the Fifth Circuit's own

precedent. See Johnson v. Thigpen, 623 F.Supp. 1121 and 806 F.2d 1243.

We point out that there is a distinct difference between an allegation of discrimination in the selection of the grand jury as a whole and one charging discrimination in the selection of only the foreman of that jury. Given the variety of processes utilized to select grand jury foreman, the effect of alleged discrimination in the selection of that foreman can range from non-existent to significant. Both Guice and Rose v. Mitchell are factually analogous. And both present a situation where discrimination in the selection process of the grand jury foreman may result in a discriminatorily selected grand jury as a whole. The case at bar and Hobby v. United States are also analogous in that both present processes in which the grand

jury members are selected in a random nondiscriminatory manner. It follows that the entire grand jury constitutes a presumptively fair cross-section of the population. From this cross-section, one member is chosen by a judge to act as foreman. Thus the possibility that discrimination in the selection of the foreman would unbalance a properly selected body of jurors by adding a discriminatorily selected member is nullified. Accordingly, just as the ministerial nature of the federal foreman's duties defeats a claim brought under the Due Process Clause of the Fifth Amendment, the ministerial nature of the duties performed by the foreman of a state grand jury defeats a claim brought under the Equal Protection Clause of the Fourteenth Amendment.

In Hobby this Court found that the assumption made and the conclusion reached in Rose was based on three considerations: 1) the nature of the constitutional injury alleged in Rose; 2) the peculiar manner in which the Tennessee grand jury selection operated; and, 3) the authority granted to the one who served as foreman. 468 U.S. at 349.

We now apply these three considerations here. The nature of the constitutional injury alleged is a violation of Equal Protection Clause. We submit that there is no showing that this alleged error affected the outcome of the prosecution here and thus no prejudice to Johnson's rights. See Vasquez v. Hillery, 474 U.S. 254, 267- 272 (1986) (Powell, J., dissenting).

As has already been pointed out, the selection system in Mississippi compares

favorably with the federal system approved in Hobby and contrasts greatly to the discriminatory system at issue in Rose. Thus, the second consideration here must be weighed in favor of the state.

The final consideration concerning the authority of the appointed foreman must also weigh in on behalf of the state. As was noted by the Mississippi Supreme Court in its direct appeal opinion, the foreman of a grand jury in Mississippi has no more discretionary responsibilities than any other member of the grand jury. Johnson, 404 So.2d at 556. This is contrasted to the role of the foreman under the Tennessee system. That foreman has the duty to assist the district attorney with investigating crime, may order witness subpoenas, may administer oaths to grand jury witnesses, must endorse every bill returned by the grand

jury, and must present any indictment to the court in the presence of the grand jury. An indictment is fatally defective in the absence of the foreman's endorsement. Hobby, 468 U.S. at 348. The contrast again between the foregoing from Rose and the situation in Hobby.

As the Court of Appeals noted, the impact of a federal grand jury foreman on the criminal justice system and the rights of persons charged with crime is "minimal and incidental at best." Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.

Nor does discrimination in the appointment of grand jury foremen impair the defendant's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives. The due process concern that no "large and identifiable segment of the community [be] excluded from jury service does not arise when the alleged discrimination pertains only to the selection of a foreman from among the members of a properly constituted federal grand jury. That the grand jury in this case was so properly constituted is not questioned. No one person can possibly represent all the "qualities of human nature and varieties of human experience," that may be present in a given community. So long as the composition of the federal grand jury as a whole serves the representational due process values expressed in Peters, discrimination in the appointment of one member of the grand jury to serve as its foreman does not conflict with those interest.

The ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interest of the

defendant protected by the Due Process Clause. Absent an infringement of the fundamental right to fairness that violates due process, there is no basis upon which to reverse petitioner's conviction or dismiss the indictment.

468 U.S. at 345-346 [emphasis in original; citations omitted].

This Court continued by describing the role of the Tennessee grand jury foreman outlined above and stating:

The investigative and administrative powers and responsibilities conferred upon the grand jury foreman in Tennessee, who possessed virtual veto power over the indictment process, stand in sharp contrast to the ministerial powers of the federal counterpart, who performs strictly clerical tasks and whose signature on an indictment is a mere formality.

468 U.S. at 348.

Thus the third consideration must be weighed on behalf of the state. The conclusion must be reached here, as it was

in Hobby, that Johnson has not suffered a deprivation of his constitutional rights.

The ruling of the Fifth Circuit Court of Appeals in this case is not in conformity with the precedent of this Court. Contrary to the conclusion reached by the Court of Appeals, this Court's opinion in Hobby, not its decision in Rose, controls here. Further, the Fifth Circuit's decision contradicts the conclusions on the same question reached by the Sixth Circuit Court of Appeals.

CONCLUSION

For the above and foregoing reasons the decision of the United States Court of Appeals for the Fifth Circuit reversing the dismissal of the petition for habeas corpus by the United States District Court in this cause was erroneous. A writ of certiorari should issue and plenary review granted in this case.

Respectfully submitted,

MIKE MOORE
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A handwritten signature in cursive script, reading "Charlene R. Pierce", written over a horizontal line.

CHARLENE R. PIERCE

CERTIFICATE OF SERVICE

I, Charlene R. Pierce, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the following:

Hon. Julie Ann Epps
Route 2, Box 226
Rienzi, Mississippi 38655

This the 29th day of July, 1991.



CHARLENE R. PIERCE

WALTER LEE JOHNSON,
Petitioner-Appellant,

v.

STEVE W. PUCKETT, et al.
Respondents-Appellees.

No. 90-1081.

United States Court of Appeals,
Fifth Circuit.

April 29, 1991.

Appeal from the United States
District Court for the Northern District
of Mississippi.

Before RUBIN, POLITZ, and DUHE,
Circuit Judges:

ALVIN B. RUBIN, Circuit Judge:

A black state prisoner, indicted for
murder in 1979 and thereafter convicted,
contends that he was denied equal
protection of the law because for a twenty
year period up to and including his
indictment, 42 grand jury foremen, all of
them white, had been appointed by the
circuit judges of the county in which he

was indicted, although the population of the county was 43% black. He alleges that the white foreman of the grand jury that indicted him was therefore selected in a racially discriminatory manner. The district court nonetheless denied his petition for a writ of habeas corpus. Because the district court applied an inappropriate standard to evaluate his equal protection claim, and because under the correct standard the petitioner has proved discrimination in the grand-jury-foreman-selection process, we reverse and remand to the district court to grant the relief requested.

I.

On September 24, 1979, Walter Lee Johnson was indicted in Panola County, Mississippi for murder in the commission of a robbery. At his trial, Johnson, a black male, moved to quash the indictment

because of racial discrimination in the selection of the grand jury foreman, but the motion was denied. The jury found Johnson guilty of capital murder and the court sentenced him to life imprisonment. He then appealed his conviction to the Mississippi Supreme Court, alleging denial of his right to equal protection because of racial discrimination in the selection of the grand jury foreman.

The historic facts contained in the state trial court evidentiary hearing record and affirmed by the Mississippi Supreme Court are not in dispute. The population of Panola County was 43% black and 57% white in 1970; by 1980, the black population had increased to 49%. Since the passage of the Mississippi Jury Selection Act,¹ effective in 1975, minorities have

¹ Miss.Code Ann. §§ 13-5-2 et seq. (Supp 1990).

been adequately represented on both grand and petit juries. The circuit judge appoints one of the grand jurors to serve as foreman after the panel has been selected. From March 1959 through Johnson's indictment in September 1979, 42 foremen had been appointed in the First Judicial District of Panola County; none of them was black.

Nevertheless, the Mississippi Supreme Court affirmed Johnson's conviction, holding that he had failed to establish that racial discrimination in the foreman selection process in Panola County had existed for the requisite "significant period of time."²

Johnson then filed a Petition for Writ of Habeas Corpus in the Northern District of Mississippi pro se, naming

²Johnson v. State, 404 So.2d 553, 556 (Miss. 1981).

the Warden of the State Penitentiary as defendant and alleging several grounds for relief. Although the United States Magistrate found Johnson's other grounds for relief without merit, he recommended that the petition be granted on the ground that the process for selecting grand jury foremen in Panola County violated the equal protection clause of the Fourteenth Amendment. The district court, however, overruled the Magistrate's recommendation and denied the writ.

II.

The central issue is which of two Supreme Court cases governs Johnson's claim. In 1979, in *Rose v. Mitchell*,³ the Supreme Court considered a claim brought by two black petitioners that discrimi-

³443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

nation in the grand-jury-foreman selection process in Tennessee constituted a violation of equal protection. The Court held that racial discrimination in the selection of the grand jury violates the equal protection clause, and that in such cases, "this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed."⁴ The Court assumed without deciding, that "discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the

⁴Id. at 551, 99 S.Ct. at 2998; see also *Hill v. Texas*, 316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942).

entire grand jury venire."⁵ Accepting the Supreme Court's assumption, this court en banc has since held that discrimination in the selection of a grand jury foreman in violation of the equal protection clause mandates that the conviction be vacated.⁶

The Supreme Court subsequently revisited this issue in *Hobby v. United States*,⁷ holding that discrimination in the selection of a federal grand jury foreman did not constitute a violation of due process and therefore did not warrant that the conviction be set aside. In the

⁵Rose, 443 U.S. at 551 n. 4, 99 S.Ct. at 299 n. 4.

⁶Guice v. Fortenberry, 661 F.2d 496, 499 (5th Cir.1981) (en banc).

⁷468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984).

present case, the district court found that the selection process and authority of grand jury foremen in Panola County were more closely akin to the procedure in the federal system than the procedure in Tennessee, concluded that Hobby constituted controlling precedent, and therefore denied Johnson's petition.

III.

[1,2] In a federal habeas corpus proceeding, we review the district court's legal determinations de novo.⁸ The State contends that Johnson's petition asserted only a claim for violation of his right to due process, rather than to equal protection, and that his claim is therefore foreclosed by Hobby.

⁸Humphrey v. Lynaugh, 861 F.2d 875, 876 (5th Cir.1988), cert. denied 490 U.S. 1024, 109 S.Ct. 1755, 104 L.Ed.2d 191 (1989).

Johnson filed his pro se petition by filling out a form required by the district court. He did not propose any specific constitutional provision as the basis for relief requested in his petition; he merely alleged as his first ground for relief: "[d]iscrimination in selection of the Grand Jury Foreman existed at the time of Petitioner's Indictment." Under a section of the form entitled "Supporting Facts," Johnson described the historical absence of black grand jury foremen in Panola County and stated that "petitioner was denied of [sic] due process." Since Johnson filed his petition pro se, we must accord it a liberal construction.⁹ Even were this not

⁹Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct 594, 596, 30 L.Ed.2d 652 (1972); Brown v. Estelle, 530 F.2d 1280, 1283 (5th Cir.1976).

a pro se petition, however, it would be sufficient to assert a claim of violation of Johnson's right to equal protection under the Fourteenth Amendment. Traditionally, a petition need only "allege the facts concerning the applicant's commitment or detention;"¹⁰ it need not plead the law.¹¹ The Supreme Court has recently construed a pretrial motion alleging only "that the prosecution had engaged in a pattern of excluding black persons from juries 'over a long period of time,'" combined with a later motion for a new trial citing only the Sixth Amendment, sufficient to raise an equal protection claim under the

¹⁰28 U.S.C. § 2242 (1988).

¹¹Bound v. Smith, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496-97, 52 L.Ed.2d 72 (1977).

Fourteenth Amendment.¹² Similarly, we find Johnson's allegation of discrimination in the grand-jury-foreman-selection process sufficient to allege a claim for relief under the equal protection clause.

Moreover, Johnson's petition states that "[t]his ground was raised during the trial and assigned as an error on Direct Appeal to the Mississippi Supreme Court." Johnson had appealed to the Mississippi Supreme Court on the sole ground that his right to equal protection was violated by the grand-jury-foreman-selection process in Panola County. Since the petition refers to his direct appeal, the State was effectively given notice of Johnson's equal protection claim. We therefore find

¹²Ford v. Georgia, U.S. , 111 S.Ct. 850, 855, 112 L.Ed.2d 935 (1991).

that Johnson's habeas petition raises a claim of denial of his right to equal protection under the Fourteenth Amendment.

IV.

The State contends, however, that even if Johnson has asserted deprivation of his right to equal protection, Hobby forecloses his claim for habeas relief. It maintains that, according to Hobby, the right to habeas corpus relief articulated in Rose depended on three considerations: 1) the nature of the constitutional injury asserted; 2) the peculiar nature of the Tennessee grand jury selection process, in which the foreman was added as a thirteenth jury member, selected from the population at large; and 3) the investigative and administrative authority granted to the Tennessee grand jury

foreman.¹³ The State asserts that since in both the federal and the Panola County system, the foreman is selected from among the grand jurors already chosen rather than from the population at large, and since the duties of both the federal and Panola County foremen are arguably merely ministerial, the present case is analogous to Hobby.

This reasoning is flawed. The essential distinction between Rose and Hobby is the nature of the alleged injury. Rose, like the present case, involved a claim brought by members of a class allegedly excluded from service as grand jury foremen, who had suffered the injuries of stigmatization and prejudice associated with racial discrimination.¹⁴

¹³Hobby, 468 U.S. at 349, 104 S.Ct. at 3098.

¹⁴Id at 347, 104 S.Ct. at 3097.

In Hobby, by contrast, a white male asserted that the exclusion of women and blacks from the position of grand jury foreman violated his right to fundamental fairness under the due process clause.¹⁵ The Hobby Court therefore considered whether the selection process and role of the federal grand jury foreman implicated the petitioner's right to fundamental fairness. The Court found that because the foreman was appointed from a randomly chosen grand jury panel representing a fair cross-section of the community, and because that foreman's responsibilities were largely ministerial, even if discrimination existed in the selection of the foreman, such discrimination did not

¹⁵Id., 104 S.Ct. at 3098.

infringe upon the petitioner's due process rights.¹⁶

The remedy mandated in *Rose*, however, did not depend on any infringement of the petitioners' right to fundamental fairness, nor on whether the defendant was prejudiced in fact.¹⁷ The injury to equal protection caused by racial discrimination in the selection of members of a grand jury "is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the processes of our courts."¹⁸ This injury to society as a

¹⁶Id. at 345-346, 350, 104 S.Ct. at 3096-97, 3099.

¹⁷*Rose*, 443 U.S. at 556, 99 S.Ct. at 3000; *Guice*, 661 F.2d at 499.

¹⁸Id., quoting *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 LEd. 181 (1946).

whole, as well as the stigmatization and prejudice directed against a distinct group, exists regardless of the extent of the grand jury foreman's authority or of the composition of the grand jury as a fair cross-section of the community, or their effect on the fundamental fairness of the judicial process. The due process analysis contained in *Hobby* is simply inapplicable to a claim of violation of equal protection through the discriminatory selection process of a grand jury foreman.

We must therefore consider Johnson's claim in accordance with the framework articulated in *Rose* and adopted by this court in *Guice v. Fortenberry*.¹⁹ We note that the limitation announced in *Teague v.*

¹⁹661 F.2d at 496.

Lane,²⁰ that new constitutional rules will not be applied retroactively on collateral review of final decisions,²¹ poses no impediment to our ability to grant habeas corpus relief to the petitioner if warranted; this court has found discrimination in the selection of a grand jury foreman to justify vacating a conviction for the past ten years,²² and Rose was decided in 1979, nearly three months before Johnson was indicted.

V.

[3,4] To establish a prima facie case of discrimination in the selection of a grand jury foreman, a petitioner must demonstrate: 1) that the group against

²⁰489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

²¹Id. at 310, 109 S.Ct. at 1075.

²²Guice, 661 F.2d at 499.

whom discrimination is asserted is a distinct class, singled out for different treatment; 2) the degree of underrepresentation by comparing the proportion of the group in the total population to the proportion called to serve as foremen over a significant period of time; and 3) that the selection procedure is susceptible to abuse or is not racially neutral.²³ This prima facie case may then be rebutted by evidence that objective, racially neutral criteria were used in the selection process.²⁴

Johnson has unquestionably satisfied the first and third prongs of this test.

²³Castaneda v. Partida, 430 U.S. 482, 494 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); Rose, 443 U.S. at 565, 99 S.Ct. at 3005; Guice, 661 F.2d at 499.

²⁴Guice v. Fortenberry, 722 F.2d 276, 281 (5th Cir.1984).

Blacks comprise a distinct class capable of being singled out for different treatment under the laws.²⁵ The grand-jury-foreman-selection process in Panola County, in which the circuit judge appoints the foreman on the basis of his own subjective criteria after having access to data concerning the race and sex of the grand jury panel members, is subject to abuse.²⁶

The State contends, however, that Johnson cannot establish a *prima facie* case of discrimination because he cannot prove underrepresentation "over a significant period of time." The Mississippi Supreme Court found that the relevant time period for consideration

²⁵Rose, 443 U.S. at 565, 99 S.Ct. at 3005.

²⁶See Guice, 661 F.2d at 503.

lasted from 1975-79, beginning with the implementation of Mississippi Jury Selection Act,²⁷ and that this was insufficient to constitute a "significant" period of time.²⁸ Although the United States Magistrate determined the relevant time period to be 1964-79, the State argues that in habeas proceedings we are bound by the conclusions of the state court, as factual determinations, unless clearly erroneous.²⁹ We do not agree that designation of the relevant time period is a purely factual determination. Rulings of law or mixed rulings of law and fact

²⁷Miss.Code Ann. §§ 13-5-2 et seq. (Supp. 1990).

²⁸Johnson v. State, 404 So.2d at 555.

²⁹28 U.S.C. § 2254(d) (1988); Sumner v. Mata, 449 U.S. 539, 551, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981).

are subject to de novo review in habeas proceedings.³⁰

[5] The significant period of time for purposes of determining a federal constitutional violation is not limited, as the Mississippi Supreme Court held, to the period after passage of the Mississippi Jury Selection Act, which was a state mandate directing a nondiscriminatory random selection process for grand and petit jurors.³¹ The Panola County court could not erase its earlier failure to adhere to federal constitutional requirements merely by following state law-and thus complying with both federal

³⁰Sumner v. Mata, 455 U.S. 591, 597, 102 S.Ct. 1303, 1306, 71 L.Ed.2d 480 (1982).

³¹Johnson State, 404 So.2d at 556; see also Herring v. State, 374 So.2d 784, 786-87 (Miss. 1979).

and state requirements-for five years. Nor is it relevant that the Jury Selection Act is indicative of "great strides" in Mississippi in eradicating racial discrimination in the selection of juries, as the Mississippi Supreme Court contends.³² As we have previously observed with regard to similar statutory reforms in Louisiana, to accept the rationale of the Mississippi Supreme Court would be to hold that Johnson has failed to state a prima facie case "simply because [Mississippi] has eliminated one admittedly discriminatory step in its foreman-selection process."³³ The plain facts are that between 1959 and 1975, 32 grand jury foremen were appointed in Panola County, and not one of them was

³²Johnson v. State, 404 So.2d at 556;

³³Guice, 722 F.2d at 279-80.

black. The discrimination against black foremen continued through 1979, by which time 42 white foremen had been chosen. While "statistics are not, of course, the whole answer, ... nothing is as emphatic as zero."³⁴ Johnson has demonstrated underrepresentation of blacks as grand jury foremen in Panola County over a significant period of time.

We therefore find that Johnson has established a prima facie case of racial discrimination in the selection process of the grand jury foreman in Panola County. We also find that the State failed to rebut this prima facie case. The Supreme Court has held that "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case

³⁴Guice, 661 F.2d at 505, quoting United States v. Hinds County School Board, 417 F.2d 852, 858 (5th Cir.1969).

of systematic exclusion."³⁵ This court has required that testimony rebutting a prima facie case of discrimination establish the use of objective, racially neutral selection procedures.³⁶ The rebuttal testimony offered by the State, by contrast, merely indicates that the judges in Panola County never stated or indicated to the circuit clerk that they selected grand jury foremen based on their race; the testimony neither denies the use of racial criteria nor advances any other objective non-discriminatory criteria used by the judges. This evidence is inadequate to rebut the presumption of discrimination established by petitioner's prima facie case.

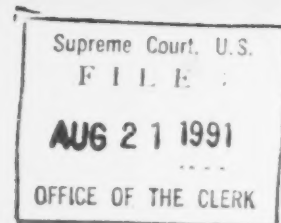
³⁵Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

³⁶Guice, 722 F.2d at 281.

We conclude that the grand jury selection process in Panola County violated Johnson's right to equal protection under the Fourteenth Amendment. In accordance with the mandates of *Rose v. Mitchell* and *Guice v. Fortenberry*, his conviction must be vacated. The State may choose to reindict him for the same crime.³⁷

For the foregoing reasons, we REVERSE and REMAND to the district court with instructions to issue the writ of habeas corpus unless, within a reasonable time to be designated by the district court, the State should again indict and try Johnson.

³⁷*Rose*, 443 U.S. at 558, 99 S.Ct. at 3001; *Guice*, 722 F.2d at 282.



NO. 91-197

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

STEVE W. PUCKETT, ET AL.,

Petitioners,

v.

WALTER LEE JOHNSON,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 91-197

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WALTER LEE JOHNSON,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Walter Lee Johnson is a black male who was convicted in 1980 in the Circuit Court of Panola County, Mississippi of murder. From 1959 until Johnson's indictment in 1979, no black had ever served as foreman of the grand jury although 42 white foreman had been appointed by the circuit judges of the county. Panola County is 43% black. (SCR/147-64).¹ The record demonstrated a long history of racial discrimination in Panola County showing that it is unlikely that a black had ever served as a grand jury foreman. (SCR/151). See, United

1. Respondent will refer to the State Court Record as SCR followed by the page number. The record in the Court of Appeals will be referred to as R. followed by the volume and page number.

States v. Duke, 332 F.2d 759 (5th Cir. 1964).¹

Johnson appealed his conviction to the Mississippi Supreme Court which affirmed Johnson's conviction despite his allegation that discrimination in the grand jury foreman violated his right to equal protection of the laws. Johnson v. State, 404 So.2d 553 (Miss. 1981).²

Johnson subsequently filed a petition for writ of habeas corpus in the Northern District of Mississippi alleging that "Discrimination in selection of the Grand Jury Foreman existed at the time of Petitioner's Indictment." (R. I/21).

The Magistrate held that Johnson's petition should be granted because the selection process for grand jury foremen in Panola County violated the equal protection clause of the Fourteenth Amendment. (Report, R. I/48-77).

Subsequently, the district court overruled the Magistrate's recommendation finding that no constitutional infirmity existed in the grand jury selection process. In doing

1. That case found that in 1961, only two black people had ever been registered to vote in Panola Count, one in 1892, the other in 1952. Since the jury list is drawn from the list of registered voters, at best only two blacks would ever have been eligible for grand jury service prior to 1961.

2. The Mississippi Supreme Court held that Johnson's claim failed because he had not proven discrimination over a "significant period of time," a claim subsequently rejected by the Court of Appeals for the Fifth Circuit and not pursued by Respondent in this court.

so, the district court relied on the due process rationale of Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 83 L.Ed.2d 260 (1984). (R. I/99-109, 110-111).

Johnson appealed to the United States Court of Appeals for the Fifth Circuit which overruled the district court holding that the due process rationale of Hobby was inappropriate to the disposition of Johnson's equal protection which the Court of Appeals found to be controlled by this Court's decision in Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Johnson v. Puckett, 929 F.2d 1067 (5th Cir. 1991).

Petitioner, the State of Mississippi, is now before this Court asking that certiorari be granted to review that holding claiming that it conflicts with Hobby and with the decision of the Sixth Circuit in Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988).

SUMMARY OF THE ARGUMENT

Petitioner is incorrect in asserting that the decision of the Fifth Circuit conflicts with Hobby, supra and with the decision of the Sixth Circuit in Ford v. Seabold, supra.

Hobby involves a claim that discrimination in the appointment of the federal grand jury foreman violated a white defendant's right to due process. Hobby held that assuming that such discrimination could be shown to exist,

reversal of a conviction was not warranted because such discrimination "does not in any sense threaten the interests of the defendant protected by the Due Process Clause [emphasis added]." 468 U.S. at 343, 104 S.Ct. at 3096.

On the contrary, in Rose v. Mitchell, this Court assumed, without deciding, that discrimination in the appointment of the foreman of a grand jury under the equal protection clause would require that the conviction be set aside.¹ Reversal is required under the equal protection clause because of the nature of the injury. In an equal protection case, the defendant has suffered the injuries of stigmatization and prejudice associated with racial discrimination. Rose v. Mitchell, 443 U.S. at 556, 99 S.Ct. at 3000.

Moreover, the injury to equal protection caused by such discrimination "is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the processes of our courts.' citation omitted]." Id.

These injuries exist regardless of whether the grand

1. Since the decision in that case, the Fifth Circuit sitting en banc has adopted the view that discrimination in the selection of the grand jury foreman which violated the equal protection clause would require reversal of the conviction. Guice v. Fortenberry, 661 F.2d 496, 499 (5th Cir. 1980) (en banc), appeal after remand, 722 F.2d 276 (5th Cir. 1984). See also, Williams v. Mississippi, 608 F.2d 1021, 1022 (5th Cir. 1979).

jury itself is properly constituted or whether the foreman's duties are merely ministerial as in Hobby.

The decision of the Fifth Circuit, furthermore, does not conflict with that of the Sixth Circuit in Ford v. Seabold, supra because that case involves a claim of discrimination in the appointment of jury commissioners rather than one involving the grand jury foreman. There is no conflict between Ford and the instant case because the Fifth Circuit here held that discrimination in the appointment of the foreman implicates the equal protection clause; whereas, the Sixth Circuit held in Ford that discrimination in the appointment of the jury commissioners does not. Ford is, therefore, readily distinguishable on the facts.

REASONS FOR DENYING CERTIORARI

I. THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT SET IN HOBBY V. UNITED STATES, SUPRA.

The uncontroverted facts establish Johnson's claim of racial discrimination in the appointment of grand jury foremen in Panola County, Mississippi. Moreover, Johnson's prima facie case of racial discrimination was un rebutted. The Fifth Circuit so found, and the State of Mississippi does not now dispute those findings, suggesting rather that the discrimination be condoned because the due process rationale of Hobby v. United States, applies to Petitioner's equal protection claim.

Under the Hobby rationale, reversal of a conviction is not warranted in a case involving a white defendant claiming a violation of his due process right to fundamental fairness where the grand jury itself was properly constituted and the duties of the grand jury foreman were merely "ministerial." Hobby, however, is not applicable to Johnson's case because Johnson is a black defendant claiming discrimination under the equal protection clause.

In Hobby, this Court assumed discrimination in the selection of the foremen of the federal grand juries in question, but held that such discrimination--"as distinguished from discrimination in the selection of the grand jury does not in any sense threaten the interests of the defendant protected by the Due Process Clause [emphasis added]." 468 U.S. at 343, 104 S.Ct. at 3096.¹

After detailing the duties of the federal grand jury foreman, this Court concluded that the due process clause was not implicated because the federal foreman's duties were "essentially clerical in nature" and because the "foreman has no authority apart from that of the grand jury as a whole to -----

1. The Court identified as due process concerns the defendant's right to be tried by a competent and impartial tribunal, the creation of an appearance of institutional bias and an important societal interest of diversity of representation on grand and petit juries. 468 U.S. supra at 343, 104 S.Ct. supra at 3095-96.

act in a manner that determines or influences whether an individual is to be prosecuted." 468 U.S. at 345, 104 S.Ct. at 3096.

With regard to the defendant's due process right to fundamental fairness, the Court went on to say that

Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment [emphasis added].

468 U.S. at 345, 104 S.Ct. at 3096-97.

As for the defendant's due process interest in assuring that the grand jury be composed of a representative cross-section of the community, the Court held that this right does not arise because "[n]o one person can possibly represent all the 'qualities of human natures and varieties of human experience,' . . . that may be present in a given community." The Court reasoned that "[s]o long as the composition of the grand jury as a whole [is composed of a representative cross-section], discrimination in the appointment of one member of the grand jury to serve as its foreman does not conflict with those interests [emphasis added]." 468 U.S. at 346, 104 S.Ct. at 3097.

The Court then distinguished Hobby's due process claim from the equal protection claim presented in Rose. The Court said that "the nature of [Hobby's] alleged injury and the constitutional basis of his claim distinguish[ed] it from those of the defendants in Rose." 468 U.S. at 347, 104 S.Ct. at 3098. The Court clarified the nature of the injury under an equal protection analysis by stating that

[a]s members of the class allegedly excluded from service as grand jury foremen, the Rose defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries [citations omitted].

468 U.S. at 347, 104 S.Ct. at 3097.

The Court also distinguished Rose from Hobby on the basis of the method used in Tennessee to select a grand jury and its foreman. In Tennessee 12 members of the grand jury were selected by the jury commissioners from a list of qualified potential jurors. The foreman was then appointed by a judge from "the general population at large" and then served as the thirteenth member of the grand jury. 468 U.S. at 347, 104 S.Ct. at 3098. The Court explained that discrimination in the selection of the foreman could then mean that 1 of the 13 members was selected in an impermissible fashion.

In contrast, the foreman in the federal system is chosen from among the members of the grand jury after they

have been impaneled. Assuming that the grand jury itself is properly constituted, according to Hobby, there would then be no risk that the overall composition of the federal array would be distorted by the selection. 468 U.S. at 348, 104 S.Ct. at 3098.¹

The Hobby Court also distinguished the Tennessee system from the federal system on the basis of the role of the grand jury foreman. In Tennessee, the foreman assists the district attorney in investigating crime, may order the issuance of subpoenas, administer oaths to grand jury witnesses, must endorse every bill returned by the grand jury and must present any indictment to the court in the presence of the grand jury. Furthermore, the absence of the foreman's signature makes an indictment in Tennessee fatally defective. Id.

By contrast, the federal foreman has no special powers and duties, his duties are essentially clerical in nature, and his signature is not necessary to the validity of an

1. Unlike the due process challenge in Hobby or a Sixth Amendment right to a representative cross-section challenge, an equal protection objection to the foreman selection process is not so much addressed to the question of the overall composition of the grand jury as it is to the injury to the class to which defendant belongs and the injury to society and to the criminal justice system which results from racial discrimination. Consequently, while due process concerns are not implicated in a grand jury foreman challenge, equal protection concerns are.

indictment.¹ Id.

The Court then said that

[g]iven the nature of the constitutional injury alleged in Rose, the peculiar manner in which the Tennessee grand jury selection operated, and the authority granted to the one who served as foreman, the Court assumed in Rose that discrimination with regard to the foreman's selection would require the setting aside of a subsequent conviction, No such assumption is appropriate here, however, in the very different context of a due process challenge by a white male to the selection of foremen of federal grand juries.

468 U.S. at 349, 104 S.Ct. at 3098.

Respondent, the State of Mississippi, reads the foregoing to mean that unless the grand jury itself was selected in a discriminatory fashion and the foreman had the power to influence the outcome of the indictment process, then no equal protection violation occurred warranting reversal. According to the State, the duties of the Mississippi foreman are no different than those of other grand jurors and the

1. Rule 6(c) of the Federal Rules of Criminal Procedure governs the appointment and duties of the federal grand jury foreman:

The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designed by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court. The record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

foreman was selected from a venire composed of a representative cross-section of the population.

The major vice in the State's analysis is that it ignores the difference between the "nature of the constitutional injury" to Johnson's equal protection rights and Hobby's due process interests.

In Hobby, this court found that a defendant does have a due process interest in having a jury which is representative of the community. Despite this interest, however, the Court held that "[s]o long as the composition of the federal grand jury as a whole serves the representational due process values [citation omitted], discrimination in the appointment of one member of the grand jury to serve as its foreman does not conflict with those interests." Hobby, 468 U.S. at 346, 104 S.Ct. at 3097.

Because, however, Johnson is alleging a deprivation of his right to equal protection--not to be discriminated against because of his race--the injury which must be redressed is to that right rather than to any due process right to a representative jury. The State would have this Court ignore the nature of Johnson's claim while placing undue emphasis on the method used to select the grand jury.

The State likewise errs in its analysis by placing undue importance on the duties of the grand jury foreman. In Hobby, this Court held that given the ministerial nature of

the position, the foreman could have little "effect upon the defendant's due process right to fundamental fairness." Once again by ignoring the basis of Johnson's constitutional injury and claim, the State has overlooked the fact that insofar as the foreman's actual duties are concerned, it is not so much his ability to influence the outcome which is at issue in an equal protection claim as it is the defendant's right and the right of his class to enjoy the full benefits of citizenship.

Moreover, assuming for the sake of argument that ability to influence the outcome of the grand jury's deliberations is relevant to an equal protection claim, the State is incorrect in asserting that the duties of Mississippi foremen are no different from those of other grand jurors and hence more closely akin to those of the federal foreman than the Tennessee foreman.

The State overlooks some significant differences between the federal grand jury foreman and the Mississippi foreman. In Mississippi as in Tennessee, but unlike the federal system, the indictment and grand jury report must be presented to the court by the foreman or the foreman's designee. In addition, Section 99-7-9, Mississippi Code of 1972 (Annotated), requires that the indictment and report have the "foreman's name endorsed thereon, accompanied by his

affidavit that all indictments were concurred in by twelve (12) or more members of the jury and that at least fifteen (15) were present during all deliberations"¹

In Mississippi, as in Tennessee, the absence of the foreman's signature renders it subject to demurrer. Atkinson v. State, 392 So.2d 205 (Miss. 1980) [Foreman's signature on the indictment is sufficient to withstand demurrer]; Jones v. State, 356 So.2d 1182 (Miss. 1978) ["This Court has pointed out on previous occasions that if the statutory requirements of section 99-7-9 (and its predecessors) are not met, it is proper to demur to such an indictment and the demurrer should be sustained"].

Thus, the Mississippi grand jury foreman has veto power over an indictment, an "authority apart from that of the grand jury as a whole to act in a manner that determines or influences whether an individual is to be prosecuted." 468 U.S. at 345, 104 S.Ct. at 3096.²

Furthermore, it is somewhat disingenuous to argue that the foreman does not exercise an extra degree of influence on

1. Rule 2.05 of the Mississippi Uniform Criminal Rules also provides that "[a]n indictment shall also include the . . . signature of the foreman of the grand jury issuing it."

2. In addition to endorsing and presenting the indictments, the foreman has additional duties which consist of administering oaths to witnesses and keeping records of the witnesses sworn. Section 13-5-63, Mississippi Code of 1972 (Annotated).

the other jurors. For example, in discussing the effect of the judge's appointment of the petit jury foreman, in United States v. Burton, 737 F.2d 439, 444 (5th Cir. 1984), this Court said, the

selection by the judge of a foreperson arguably clothes the foreperson with some particular authority. We can only guess how that circumstance may affect the dynamics of deliberation, but we are comfortable in concluding that there are effects.

See, also, United States v. Cross, 708 F.2d 631 (11th Cir. 1983), vacated in light of Hobby, 104 S.Ct. 3580, on remand 742 F.2d 1279 (11th Cir. 1984) [The selection of the foreman by the judge could endow the foreperson with enhanced persuasive influence over his peers].¹

Regardless of the method of selection and the duties of the foreman, the basis of Johnson's constitutional claim and the nature of his injury are the significant factors determining whether he is entitled to have his conviction set aside. The Court in Hobby emphasized that the question it was deciding was "the narrow one of the appropriate remedy for such a violation [Fifth Amendment due process rights]." 468 U.S. at 342, 104 S.Ct. 3095. The Court's conclusion that no remedy was appropriate in Hobby is based on the Court's

1. Moreover, the circuit judges in Panola County felt the need to consult with other officials before appointing a foreman indicates that the foreman occupies a position of importance on the grand jury.

conclusion that "[d]iscrimination in the selection of grand jury foremen--as distinguished from discrimination in the selection of the grand jury itself--does not in any sense threaten the interests of the defendant protected by the Due Process Clause." 468 U.S. at 343, 104 S.Ct. 3096.

Implicit within the Respondent's argument is a belief that the nature of Johnson's constitutional claim is irrelevant. Such a conclusion is not supported by Hobby. Johnson, a black male, has suffered a constitutional injury to his right to equal protection under the law. Members of his race have been systematically excluded from service as foremen on grand juries for at least twenty years in Panola County. They have been denied their right to participate equally in the responsibilities of citizenship.

Like the Rose defendants, Johnson has "suffered the injuries of stigmatization and prejudice associated with racial discrimination." Rose v. Mitchell, 443 U.S. at 347, 99 S.Ct. at 3097. Moreover, he has suffered this stigmatization regardless of whether the total venire was properly selected. While he has no right to have a black as foreman, he does have the right to a foreman who has been selected by criteria which are racially neutral.

Furthermore, Johnson has suffered another injury to his right to equal protection. The Supreme Court has said that "discrimination on account of race in the administration of

justice strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our system of justice. [Furthermore, such] discrimination . . . is 'at war with our basic concepts of a democratic society and a representative government, [citation omitted]" Rose v. Mitchell, 443 U.S. at 556, 99 S.Ct. at 3000.

Consequently, because the nature of the injury to Johnson's equal protection rights is more substantial than the injuries to the defendant's due process interests in Hobby, this Court should reject the state's argument that Hobby controls this case and deny certiorari.

The deliberate exclusion of blacks "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

Vasquez v. Hillery, 474 U.S. 254, 260, 106 S.Ct. 617, 621, 88 L.Ed.2d 598 (1986), quoting Strauder v. West Virginia, 10 Otto 303, 308, 100 U.S. 303, 308, 25 L.Ed. 664 (1880).

The racially discriminatory practices which occurred in this case both "stigmatized" Johnson and all black people in Panola County and served as "an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." Id. Such practices cannot be countenanced under the equal protection clause even though the grand jury itself may have been selected in a racially

non-discriminatory manner.

The decision of the Court of Appeals does not, therefore, conflict with this Court's decision in Hobby, and certiorari is not appropriate in this case.

II. THE RULING BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS REGARDING THE CRITERIA TO BE UTILIZED FOR CONSIDERATION OF A CLAIM INVOLVING SELECTION OF A GRAND JURY FOREMAN.

The State also claims that this Court should grant certiorari because the Fifth Circuit's decision in this case conflicts with the decision of the Sixth Circuit in Ford v. Seabold, supra. That case, however, is readily distinguishable from Johnson's on its facts.¹

Ford was convicted of capital murder. Among other

1. The State also seems to be saying that the decision in Johnson conflicts with the decision in Johnson v. Thigpen, 623 F.Supp. 1121 (S.D.Miss. 1985), aff'd 896 F.2d 1243 (5th Cir. 1986). That case, however, held that where the grand jury foreman was selected by the grand jury members themselves rather than by the judge as in this case, there was no showing of discrimination because the process was random and neutral. The case, therefore, is inapposite. See, Respondent's Brief, pp. 26, 38.

The State also seems to be arguing, or suggesting at any rate, that the decision in this case conflicts with Matthews v. Barnett, 918 F.2d 955 (4th Cir. 1990), an unpublished opinion of the Fourth Circuit. This case holds that the defendant could not raise a grand jury foreman claim because Rose was not retroactive. In passing, the Court remarked that "The Court has since distinguished Rose, holding that discrimination in the selection of a foreman from among the grand jury members, to perform largely ministerial functions, does not invalidate a conviction under the due process clause. Hobby v. United States, 468 U.S. 339 (1984) [emphasis added]" Matthews v. Barnett, even in dictum, does not conflict with this case, therefore, because this case is brought under the equal protection clause. Id. at 27.

challenges to the Franklin County, Kentucky grand and petit jury systems, Ford claimed that his Fourteenth Amendment due process and equal protection rights were violated because the county had appointed no nonwhites to serve as jury commissioner. Ford relied on Carter v. Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970) wherein this Court "assume[d] that the state may no more exclude negroes from service on the jury commission because of their race than from the juries themselves." 396 U.S. at 321, 90 S.Ct. at 519. Carter was a civil suit where black citizens of Greene County, Alabama sought an order vacating the appointments of the Greene County jury commissioners. In Carter, however, the plaintiffs were entitled to no relief because they failed to prove a prima facie showing of racial discrimination. The Sixth Circuit held that Ford, like the Carter plaintiffs, had failed to proffer any evidence of discrimination. Ford v. Seabold, 841 F.2d at 689.

The Court went on to in dictum to distinguish Carter¹ saying that even if Ford had shown discrimination in the appointment of blacks to the commission, "the Constitution does not compel reversal of Ford's conviction since Ford suffered no prejudice and any discrimination in the appoint-

1. Because Carter was a civil case, the relief requested was injunctive.

ment of the commissioners would not undermine the integrity of the indictment and conviction." Id. Citing Hobby, The Court then said, "the impact of any perceived discrimination in selecting the commissioners would not, because of the technical nature of the commissioner's job responsibilities, cast doubt on the judicial process." Id. Lastly, the Court noted that "the jury commissioners do not participate as grand or petit jurors and thus have no direct influence over the outcome of any criminal cases [emphasis added]." Id. at 690.

The difference between Johnson's case and Ford's is readily apparent. Ford argued that his case should be reversed because of discrimination in the selection of the jury commissioners who "do not participate as grand or petit jurors and thus have no direct influence over the outcome of any criminal case." Id. at 690. The same cannot be said about the grand jury foremen.

Even under an equal protection analysis reversal of a conviction was not required in Ford because no doubt would be cast on the integrity of the judicial process because the commissioner's job responsibilities were technical and because he has no direct influence over the outcome of the criminal case. Id. at 689. This is clearly not the case with the grand jury foreman who, unlike the commissioners, does directly influence the outcome of an indictment.

The only possible way that discrimination in the ap-

pointment of the commissioners could influence the actual outcome of a case would be if the commissioner used the office to select jury venires where certain races or classes of people were underrepresented. Where, however, the commissioner has failed to do this and the venire is lawfully constituted, as in Ford, the commissioner has had no impact whatsoever impact on the outcome of the case. The same is not true of the grand jury foreman who does vote in the case.

Moreover, his connection with the system is too remote to warrant a reversal of a conviction because of the possibility that discrimination in his appointment will undermine public confidence in the judicial system.¹ Again, unlike the foreman, his lack of power to directly influence the outcome simply does not warrant a public policy of reversal for discrimination in his appointment.

The decision of the Fifth Circuit in this case, therefore, does not conflict with the Sixth Circuit's in Ford because that case, even in dictum, holds only that discrimination in the appointment of jury commissioners does not implicate the equal protection clause to a degree warranting reversal of conviction. It does not follow as the State reasons that the Sixth Circuit in so opining is holding that

1. Injunctive or other similar relief in a civil forum would under Carter, supra, however, be appropriate.


discrimination in the appointment of the foreman does not warrant reversal.¹ There is, therefore, no conflict between Ford and this case, and this Court should deny certiorari.

CONCLUSION

Because there is no conflict between the decision in this case and Hobby or Ford, this Court should deny certiorari. Rule 10 of the Rules of this Court provides that certiorari will be granted "only when there are special and important reasons therefor." The State proffers only insubstantial reasons why this Court should exercise this power to excuse Panola County from the consequences of years of racial discrimination in its criminal justice system. Such an exercise of discretion would be unworthy of this Court.

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1. Indeed, had the Sixth Circuit so held that decision would conflict with Rose which assumes that discrimination in the appointment of the foreman would require reversal.